

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
AVR, L.P. d/b/a)	
Hyperion of Tennessee, L.P.)	
Petition for Preemption of)	
Tennessee Code Annotated)	CC Docket No. 98-92
§ 65-4-201(d) and Tennessee)	
Regulatory Authority Decision)	
Denying Hyperion's Application)	
Requesting Authority to)	
Provide Service in Tennessee)	
Rural LEC Service Areas)	

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1999

Released: May 27, 1999

By the Commission:

1. On May 29, 1998, AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. (Hyperion) filed the above-captioned petition (Petition) asking the Commission to: (i) preempt Tenn. Code Ann. § 65-4-201(d), and (ii) preempt the enforcement of the April 9, 1998, order of the Tennessee Regulatory Authority (Authority or Tennessee Authority) denying Hyperion a Certificate of Public Convenience and Necessity (CPCN) to provide local exchange service in areas of Tennessee served by the Tennessee Telephone Company (Denial Order).¹ Hyperion also asks the Commission to direct the Tennessee Authority to grant Hyperion's application for a CPCN.² Hyperion asserts that the Tennessee Authority's *Denial Order* and Tenn. Code Ann. § 65-4-201(d) violate section 253(a) of the Communications Act of 1934, as amended,³

¹ *In Re: AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr. 9, 1998) (Denial Order).*

² Petition at 23.

³ 47 U.S.C. § 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* All citations to the 1996 Act will be to the 1996 Act as *codified in* Title 47 of the United States Code.

fall outside the scope of authority reserved to the states by section 253(b) of the Act,⁴ and thus satisfy the requirements for preemption by the Commission pursuant to section 253(d) of the Act.⁵

2. For the reasons described below, we grant Hyperion's Petition in part and deny it in part. Specifically, we preempt the enforcement of the Tennessee Authority's *Denial Order* and Tenn. Code Ann. § 65-4-201(d),⁶ but we decline to direct the Tennessee Authority to grant Hyperion's CPCN application. We expect, however, that upon a request from Hyperion, the Authority will expeditiously reconsider Hyperion's CPCN application in a manner consistent with the Communications Act and with this Memorandum Opinion and Order.

II. BACKGROUND

3. Hyperion is a facilities-based competitive local exchange carrier operating in twelve states.⁷ Hyperion has constructed a fiber-based network in the Nashville, Tennessee area, and is in the process of extending that network into outlying areas of Tennessee, including areas currently served by the Tennessee Telephone Company (Tennessee Telephone).⁸ Tennessee Telephone serves fewer than 100,000 residential and business customers in Tennessee.⁹

4. On August 24, 1995, the Tennessee Public Service Commission (TPSC, the predecessor to the Tennessee Authority) found that Hyperion possessed the requisite technical, managerial, and financial qualifications to render local exchange services, and granted

⁴ 47 U.S.C. § 253(b).

⁵ 47 U.S.C. § 253(d). The Commission placed Hyperion's Petition on public notice on June 12, 1998. *Pleading Cycle Established for Comments on Hyperion Petition for Preemption of Tennessee Regulatory Authority Order*, Public Notice, CC Docket No. 98-92, DA 987-1115 (rel. June 12, 1998). The Association for Local Telecommunications Services (ALTS), KMC Telecom Inc. (KMC), MCI Telecommunications Corporation (MCI), TDS Telecommunications Corporation (TDS), the Tennessee Authority, and WorldCom, Inc. (WorldCom) filed comments, and Hyperion, MCI, and TDS filed replies.

⁶ TENN. CODE ANN. § 65-4-201(d).

⁷ Petition at 2.

⁸ *Id.*

⁹ Tennessee Telephone Company serves approximately 45,121 residential and 11,665 business customers in Tennessee. *AVR of Tennessee, L.P., d/b/a Hyperion Telecommunications of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Extend its territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company*, Application, Petition Exhibit D at 3.

Hyperion a CPCN to provide such services in Tennessee.¹⁰ The following March, however, the TPSC issued an order limiting Hyperion's certificate to only those areas of Tennessee that are served by companies having 100,000 access lines or more within the state.¹¹ The TPSC explained that, under Tennessee law, incumbent LECs serving fewer than 100,000 access lines were protected from competition "until the incumbent LEC either ' . . . voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider' or the incumbent LEC . . . 'applies for a certificate to provide telecommunications services in an area outside its service area.'"¹²

5. Hyperion, believing the restriction to be inconsistent with the 1996 Act, petitioned the Tennessee Authority on January 2, 1998, for permission to extend its service into the areas served by Tennessee Telephone. On April 9, 1998, the Authority denied Hyperion's application. The Authority based its denial on Tenn. Code Ann. § 65-4-201, which in relevant part provides:

- (c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications provider if after examining the evidence presented, the authority finds:
 - (1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules, and orders; and
 - (2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

- (d) Subsection (c) is not applicable to areas served by an incumbent local exchange company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the June 6, 1995.¹³

¹⁰ *The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Services Within Davidson, Williamson, Maury, Rutherford, Wilson, and Sumner Counties, Tennessee*, Docket No. 94-00661, (TPSC Aug. 24, 1995), Petition Exhibit B.

¹¹ *The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Point-to-Point and Telecommunications Access Service Within the State of Tennessee*, Order, Docket No. 94-00661 (TPSC Mar. 8, 1996), Petition Exhibit C, (*TPSC Restriction Order*).

¹² TPSC Restriction Order at 5.

¹³ TENN. CODE ANN. § 65-4-201; Petition at 4.

6. The transcript of the Tennessee Authority's March 10, 1998, hearing denying Hyperion's application reveals that disagreement arose within the Authority on the effect of Tenn. Code Ann. § 65-4-201(d) on Hyperion's petition.¹⁴ The incumbent LEC into whose service territory Hyperion wished to expand, Tennessee Telephone, served fewer than 100,000 access lines in Tennessee, so it clearly fell within the class protected from competition by Tenn. Code Ann. § 65-4-201(d). During the hearing, however, the Authority's Chairman argued that subsection (d) was inconsistent with the 1996 Act's purpose and the plain meaning of section 253(a), which preempts state legal requirements that prohibit the provision of telecommunications service.¹⁵ The Authority's two other Directors argued that subsection (d) lay within the regulatory authority reserved to the states in section 253(b), which excludes from preemption state or local requirements necessary to protect universal service and certain other public interest goals, if such requirements are competitively neutral and consistent with the Act's universal service provisions.¹⁶ In its *Denial Order*, the Authority concluded that Tenn. Code Ann. § 65-4-201(d) does satisfy the requirements of section 253(b), and that therefore section 253(b) operates as a limitation on Hyperion's challenge under 253(a).¹⁷ Hyperion contends that Tenn. Code Ann. § 65-4-201(d) is inconsistent with section 253 and with Commission precedent, and on that basis petitions us to preempt Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's *Denial Order*.¹⁸

7. In assessing whether to preempt enforcement of the *Denial Order* and Tenn. Code Ann. § 65-4-201(d) pursuant to section 253, we first determine whether those legal requirements are proscribed by section 253(a), which states:

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the

¹⁴ Transcript of the Tennessee Regulatory Authority's March 10, 1998, Hearing Denying Hyperion's Application, Petition Exhibit E (*Hearing*).

¹⁵ "I personally believe that the Tennessee Regulatory Authority has a duty to uphold both the vision and the substance of the Federal Communications Act of 1996. This Act provides the framework from which competition in the telecommunications industry can develop. Section 253(a) of the Act specifically addresses the prohibition of any State regulation or statute that prohibits the ability of any entity to provide any interstate or intrastate telecommunication service. As I see it, we have a conflict between the federal law and one of our State statutes, and the federal law must prevail." Chairman Greer, Hearing at 7.

¹⁶ "To be sure, there exists a host of arguments [that] Section 65-4-201(d) is not competitively neutral as this phrase is defined by the FCC. Nonetheless, given the legislature's rationale for enacting section 65-4-201(d), the language of section 253(b) as a whole, section 65-4-201(d)'s pronouncement that any such protected interest forfeits its protection if it seeks to compete outside the area, and the requirement that the general assembly review this statute every two years, this statute may be held competitively neutral. . . . I am persuaded that at a minimum the State of Tennessee should have the opportunity, should it so choose, to argue before the FCC that its statute is, notwithstanding the FCC's prior rulings, competitively neutral." Director Malone, Hearing at 11-12.

¹⁷ *Denial Order* at 11.

¹⁸ Petition at 8.

ability of any entity to provide any interstate or intrastate telecommunications service.¹⁹

8. If we find that the *Denial Order* and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a) considered in isolation, we must then determine whether, nonetheless, they fall within the reservation of state authority set forth in section 253(b), which provides:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.²⁰

9. If the *Denial Order* and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a), and do not fall within the scope of section 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d), which provides:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.²¹

10. Hyperion maintains that because it has met the technical, managerial, and financial qualifications to provide service, only Tenn. Code Ann. § 65-4-201(d)'s protection of incumbent LECs serving fewer than 100,000 lines, and the *Denial Order* enforcement of that statutory provision, prevented Hyperion from providing local exchange service in Tennessee Telephone's service areas.²² Hyperion further maintains that these legal requirements fall squarely within section 253(a)'s proscription of state legal requirements that prohibit the ability of any entity to provide any telecommunications service.²³ According to

¹⁹ 47 U.S.C. § 253(a).

²⁰ 47 U.S.C. § 253(b).

²¹ 47 U.S.C. § 253(d).

²² Petition at 6. Although TENN. CODE ANN. § 65-4-201(d) does permit competition in areas served by incumbent LECs with fewer than 100,000 access lines when the incumbent LEC enters into an interconnection agreement with the competitor or itself applies for CPCN outside its service area, neither exception applies to this case.

²³ Petition at 8.

Hyperion, Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* are virtually identical to two previous state requirements which ran afoul of section 253(a), and which the Commission preempted in the *Texas Preemption Order* and *Silver Star Preemption Order* decisions.²⁴

11. Neither the Tennessee Authority nor TDS Telecommunications Corporation (TDS) argues that the *Denial Order* or Tenn. Code Ann. § 65-4-201(d) can survive section 253(a) considered in isolation, but they insist that the statutory provision and the *Denial Order* fall within the reservation of state authority provided in 253(b).²⁵ Specifically, the Tennessee Authority argues that Tenn. Code Ann. § 65-4-201(d) falls within section 253(b) because the provision is necessary to preserve and advance universal service and other public welfare goals,²⁶ and because the provision applies in a competitively neutral manner to all non-incumbent LECs.²⁷ The Authority explains that Tenn. Code Ann. § 65-4-201(d) is competitively neutral because the restriction on entry into the service areas of small LECs applies to all providers within the state, and thus they argue that no provider is given a competitive advantage over any other.²⁸ TDS likewise maintains that the Authority's denial of Hyperion's application is a proper exercise of state authority under 253(b) because it is consistent with the universal service provisions of the 1996 Act,²⁹ is necessary to protect consumer interests,³⁰ and is competitively neutral.³¹ TDS contends that potential competing LECs are not subject to the same terms and conditions as incumbent LECs, and that the Tennessee Authority may therefore treat them differently and still maintain competitive neutrality.³² Hyperion and its supporters disagree, and argue that section 253(b) does not exempt Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* from preemption, because the

²⁴ Petition at 15-18; *The Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3511, ¶¶ 106-07 (1997) (*Texas Preemption Order*); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656-57, ¶¶ 38-39 (1997) (*Silver Star Preemption Order*). ALTS, KMC, MCI, and WorldCom agree with Hyperion that the Tennessee statute is in direct conflict with Section 253(a). ALTS Comments at 2; KMC Comments at 2; MCI at Comments at 1; WorldCom Comments at 1-2; AVR Reply at 3; MCI Reply at 1-2.

²⁵ Tennessee Authority Comments at 3-6; TDS Comments at 5-15. TDS owns four subsidiaries in Tennessee, one of which is the Tennessee Telephone Company. TDS Comments at 1.

²⁶ Tennessee Authority Comments at 3-5.

²⁷ Tennessee Authority Comments at 6.

²⁸ *Id.*

²⁹ TDS Comments at 6-7.

³⁰ TDS Comments at 5-7; TDS Reply at 2-3.

³¹ TDS Comments at 8-10; TDS Reply at 3-4.

³² *Id.*

code and the *Denial Order* favor the incumbent LEC over new entrants, and are therefore not "competitively neutral" under section 253(b).³³

III. Discussion

12. We conclude that, in denying Hyperion the right to provide competing local exchange service in the area served by Tennessee Telephone, Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's *Denial Order* violate section 253(a). We further conclude that, because these state and local legal requirements shield the incumbent LEC from competition by other LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in section 253(b). Finally, we conclude that, because the requirements violate section 253(a), and do not fall within the boundaries of section 253(b), we must preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) and the *Denial Order*, as directed by section 253(d).

13. The case before us is similar to two cases the Commission has previously decided. In the *Silver Star Preemption Order*, the Commission preempted the enforcement of a provision of the Wyoming Telecommunications Act of 1995³⁴ that empowered incumbent LECs serving 30,000 or fewer access lines in Wyoming to preclude anyone from providing competing local exchange service in their territories until at least January 1, 2005.³⁵ The Commission also preempted the enforcement of an order of the Wyoming Public Service Commission denying, on the basis of that provision, the application of Silver Star Telephone Company to provide competing local service in a neighboring incumbent's local exchange area.³⁶ In ordering the preemption, the Commission determined that the rural incumbent protection provision and the Wyoming Commission's *Denial Order* fell within the proscription of entry barriers set forth in section 253(a) because they enabled certain incumbent LECs to bar other entities from providing competing local service.³⁷ The Commission found that the rural incumbent protection provision's lack of competitive neutrality placed the Wyoming legal requirements outside the authority reserved to the States by section 253(b).³⁸

³³ Petition at 10-11; ALTS Comments at 4; KMC Comments at 3-4; MCI at Comments at 3-5; Hyperion Reply at 3; MCI Reply at 2.

³⁴ WYO. STAT. ANN. §§ 37-15-101, *et seq.*

³⁵ WYO. STAT. ANN. § 37-15-201(c).

³⁶ *Application of Silver Star Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Service the Afton Local Exchange Area, Order Denying Concurrent Certification*, Docket No. 70006-TA-96-24 (Wyoming Commission Dec. 4, 1996).

³⁷ *Silver Star Preemption Order*, 12 FCC Rcd at 15656-57, ¶¶ 38-39.

³⁸ *Silver Star Preemption Order*, 12 FCC Rcd at 15657-59, ¶¶ 41-44.

14. Similarly, in the *Texas Preemption Order*,³⁹ the Commission preempted a section of the Texas Public Utility Act of 1995 that prohibited the Public Utilities Commission of Texas from permitting certain competitive LECs to offer service in exchange areas of incumbent LECs serving fewer than 31,000 access lines.⁴⁰ The Commission found that the moratorium on competition violated the terms of section 253(a) of the Act.⁴¹ The Commission also found that the Texas provision did not fall within the exempted state regulation described in section 253(b), because the prohibition was neither competitively neutral nor necessary to achieve any of the policy goals enumerated in section 253(b).⁴²

15. Our decision here to preempt is consistent with these precedents and comports with the analysis set forth therein. Tennessee's restriction of competition in service areas with fewer than 100,000 access lines is essentially the same as the attempt of both Wyoming and Texas to shield small, rural LECs from competition, and cannot be squared with section 253(a)'s ban on state or local requirements that "may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service."⁴³ Also, as in both the *Silver Star* and *Texas Preemption Orders*, we find that the lack of competitive neutrality renders the Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* ineligible for the protection of section 253(b).

16. We reject the Tennessee Authority's contention that "competitive neutrality" can be interpreted under section 253(b) to mean only that non-incumbents must be treated alike while incumbents may be favored.⁴⁴ As we explained in our *Silver Star Reconsideration*, a state legal requirement would not as a general matter be "competitively neutral" if it favors incumbent LECs over new entrants (or vice-versa).⁴⁵ Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market – new entrants – and not to all carriers in that market. The plain meaning of section 253(b) and the predominant pro-

³⁹ *Texas Preemption Order*, 13 FCC Rcd 3460 (1997).

⁴⁰ Texas Public Utility Act of 1995 § 3.2531(h).

⁴¹ *Texas Preemption Order*, 13 FCC Rcd at 3511, ¶ 106.

⁴² *Texas Preemption Order*, 13 FCC Rcd at 3511, ¶ 107.

⁴³ 47 U.S.C. § 253(a) (emphasis added).

⁴⁴ Tennessee Authority Comments at 6.

⁴⁵ *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, CCBPol 97-1, FCC 98-205, ¶¶ 9-10 (rel. Aug. 24, 1998) (*Silver Star Reconsideration*). See also *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19721-22, ¶ 20 (1996) (holding that legal requirement at issue was not competitively neutral under section 253(b) because "the prohibition allows incumbent LECs and certified LECs to offer payphone services, but bars another class of providers (independent payphone providers)"); *Recon. denied*, Memorandum Opinion and Order, FCC 97-143 (rel. April 18, 1997).

competitive policy of the 1996 Act undermine the Authority's argument. Indeed, in various similar contexts the Commission has consistently construed the term "competitively neutral" as requiring competitive neutrality among the entire universe of participants and potential participants in a market.⁴⁶ We reaffirm our holding in the *Silver Star Reconsideration* that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue.

17. TDS elaborates on the Authority's argument by contending that competing LECs do not operate under the same terms and conditions as incumbent LECs, and that this disparity in their regulatory obligations permits the Tennessee Authority to treat them differently and still maintain competitive neutrality.⁴⁷ TDS thus argues that the principle of "competitive neutrality" does not preclude carriers in dissimilar situations from being treated somewhat differently. Providing for "somewhat" different treatment, however, is an entirely distinct proposition from barring competitive entry altogether.⁴⁸ At the very least, "competitive neutrality" for purposes of 253(b) does not countenance absolute exclusion, and we need not and therefore do not reach the question of the extent to which state commissions may treat competing LECs differently from incumbent LECs in certain instances. We find here that because Tenn. Code Ann. § 65-4-201(d) favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and therefore is not competitively neutral.

18. That Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* are not competitively neutral suffices of itself to disqualify these requirements from the 253(b)

⁴⁶ See, e.g., *Telephone Number Portability*, Third Report and Order, FCC 98-82, CC Docket No. 95-116, ¶ 53 (rel. May 12, 1998) (a competitively neutral cost recovery mechanism "(1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return"); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22132 at ¶ 24 (1997) ("Competitive neutrality would require that separations rules not favor one telecommunications provider over another or one class of providers over another class"); *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21443-44 at ¶ 206 (1996) ("If in practice only incumbent LECs can receive universal service support, then the disbursement mechanism is not competitively neutral").

⁴⁷ TDS Comments at 8-10; TDS Reply at 3-4.

⁴⁸ We agree that in order to qualify for protection under section 253(b), a state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance. As the Commission has previously explained: "non-discriminatory and competitively neutral" treatment does not necessarily mean 'equal' treatment. For instance, it could be a non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities 'equally.'" *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20310 at ¶ 195 (1996). See *Separations NPRM*, 12 FCC Rcd at 22132, ¶ 24 ("Competitive neutrality . . . would not, however, preclude carriers in dissimilar situations from being treated differently").

exception.⁴⁹ Therefore, we need not reach the question of whether Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* are “necessary,” or “consistent with section 254” within the meaning of section 253(b). We note, however, that, for the reasons we gave in response to similar arguments that were raised in our *Silver Star Preemption Order* decision, we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service.⁵⁰ Moreover, by requiring competitive neutrality, Congress has already decided, in essence, that outright bans of competitive entry are never “necessary” to preserve and advance universal service within the meaning of section 253(b).⁵¹

19. TDS introduces three arguments by which it attempts to distinguish the case before us from other cases we have decided under section 253. First, TDS points out that the Tennessee legislature provided for Tenn. Code Ann. § 65-4-201(d) to be examined every two years to reevaluate the “transitional distinction” in treating applications to serve areas served by incumbent LECs with fewer than 100,000 access lines, and contrasts Tennessee’s biennial review with the Wyoming statute at issue in the *Silver Star Preemption Order*, which gave rural incumbent LECs a veto provision that would apply until 2005.⁵² This is a distinction without a difference for purposes of our analysis because, as we held in the *Silver Star Preemption Order*, even a temporary ban on competition can be an absolute prohibition, and section 253 does not exempt from its reach State-created barriers to entry that may expire at some later date.⁵³

⁴⁹ *Silver Star Preemption Order*, 12 FCC Rcd at 15660, ¶ 45. *Accord Texas Preemption Order*, 13 FCC Rcd at 3480, ¶ 41; *Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd. 13082, 13101, ¶ 35.

⁵⁰ Specifically, we noted that section 251(f) of the Act affords rural and small LECs certain avenues of relief from the interconnection duties set forth in sections 251(b) and (c), and that sections 253(f) and 214(e)(2) also provide states special latitude in regulating emerging competition in markets served by rural telephone companies. Section 253(f) permits a state to require a telecommunications carrier to meet certain universal service requirements as a condition for obtaining permission to compete with a rural telephone company. Section 214(e)(2) permits a state, with respect to an area served by a rural telephone company, to decline to designate more than one common carrier as an “eligible telecommunications carrier” for purposes of receiving universal service support. These accommodations to the needs of rural telephone companies indicate that Congress recognized that the special circumstances of rural and small LECs warrant special regulatory treatment. In choosing less competitively restrictive means of protecting rural and small LECs, however, Congress revealed its intent to preclude states from imposing the far more competitively restrictive protection of an absolute ban on competition. *Silver Star Preemption Order*, 12 FCC Rcd at 15658-59, ¶¶ 43-44.

⁵¹ *Silver Star Reconsideration*, FCC 98-205, ¶ 19.

⁵² TDS at Comments 12 (contrasting TENN. CODE ANN. § 65-5-211 with WYO. STAT. §§ 37-15-101 *et seq.*).

⁵³ *Silver Star Preemption Order*, 12 FCC Rcd at 15657, ¶ 39. We note that the 1996 Act contains numerous deadlines requiring the Commission and State commissions to complete with dispatch various tasks implementing the 1996 Act. *See, e.g.*, 47 U.S.C §§ 251(d)(1); 251(f)(1)(B); 252(e)(4); 254(a); 257(a); 271(d)(3); 276(b). By requiring relatively swift administrative implementation of the pro-competitive provisions of the 1996 Act, these deadlines highlight that Tennessee’s statutory delay of competition conflicts with Congressional intent.

20. Second, TDS argues that “unanticipated confusion and controversy surrounding the universal service plan” justifies the Tennessee Authority’s delay of competitive entry into rural areas.⁵⁴ As the Commission has previously stated, we reject the assumption that competition and universal service are at cross purposes, and that in rural areas the former must be curtailed to promote the latter.⁵⁵ Section 253 is itself evidence that Congress intended primarily for competitive markets to determine which entrants should provide the telecommunications services demanded by consumers.⁵⁶ We continue to believe that Congress intended new competitors to bring the benefits of competition to rural as well as populous markets.⁵⁷

21. Third, TDS contends that even if the Commission is correct in preempting enforcement of the Authority’s *Denial Order*, the Commission should not preempt Tenn. Code Ann. § 65-4-201(d) itself.⁵⁸ TDS argues that although the Authority has applied the statute to preclude competition in this case, the statute permits the Authority to allow competition in

⁵⁴ TDS Comments at 14; TDS Reply at 2-3.

⁵⁵ *Accord Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8800, ¶ 47 (1997) (“competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another”). See generally *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, 267 ¶ 345 (1996) (“We recommend that any competitive bidding system be competitively neutral and not favor either the incumbent or new entrants”).

⁵⁶ *Silver Star Preemption Order*, 12 FCC Rcd at 15656, ¶ 38.

⁵⁷ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16118, ¶ 1262 (1996) (“We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service.”) What the Commission said in the *Universal Service Order* regarding the “false choice” between competition and universal service also bears reiteration:

Commenters who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.

Universal Service Order, 12 FCC Rcd at 8802-03, ¶ 50.

⁵⁸ TDS at Comments at 15-18.

other circumstances.⁵⁹ TDS suggests that Tenn. Code Ann. § 65-4-201(d) might therefore be applied in way that would not offend section 253,⁶⁰ and therefore should be left standing, in obedience to 253(d)'s instruction to the Commission to preempt only "to the extent necessary to correct such violation or inconsistency."⁶¹

22. We are mindful of the limits that section 253 (d) places on our preemption authority. Further, the construction of a state statute by a state commission informs our determination of whether the statute is subject to preemption under section 253.⁶² In this case, however, TDS's construction of Tenn. Code Ann. § 65-4-201(d) conflicts with that of the Tennessee Authority, which we regard as dispositive.⁶³ According to the Authority, Tenn. Code Ann. § 65-4-201(d) does require the Tennessee Authority to deny any and all CPCN applications within its scope.⁶⁴ For this reason we reject TDS's argument that Tenn. Code Ann. § 65-4-201(d) may stand even if the Authority's *Denial Order* must fall. We decline, however, to grant Hyperion's request that we direct the Tennessee Authority to grant Hyperion's application for a CPCN because we do not believe such a step is necessary at this time.⁶⁵ Based on our explanation regarding the force and effect of section 253 in this case, we expect that the Authority will respond to any request by Hyperion to reconsider Hyperion's application for a concurrent CPCN consistent with the Communications Act and this decision.⁶⁶

23. Hyperion brings to our attention that states other than Tennessee have legal requirements that appear to be similar to Tennessee's Section 65-4-201(d), and maintains that these requirements may also restrict competition in the way we have found unlawful here and in the *Silver Star* and *Texas Preemption Orders*.⁶⁷ Hyperion urges us to clarify generally the

⁵⁹ TDS Comments at 15, 17.

⁶⁰ TDS states that § 65-4-201(d) allows the Tennessee Authority to obtain useful information through closer scrutiny of applications to serve rural areas. TDS Comments at 18.

⁶¹ TDS Comments at 15.

⁶² See *Texas Preemption Order*, 13 FCC Rcd at 3464-3466, ¶¶ 7-11.

⁶³ *Id.* See also, e.g., *Ginsburg v. New York*, 390 U.S. 629, 643-44 (1968).

⁶⁴ TPSC Restriction Order at 4 ("Subsection (d) clearly restricts the authority of the Public Service Commission to grant a certificate to a Competing Telecommunications Service Provider"); see also *Denial Order* at 8.

⁶⁵ Petition at 23.

⁶⁶ Given our disposition of the Petition on the bases discussed in the text, we need not and do not address the merits of other arguments raised by the parties.

⁶⁷ Hyperion Petition at 21; See Letter from Kecia Boney, MCI Telecommunications Corp., to Magalie R. Salas, Secretary, FCC, Jan. 6, 1999. See also *Louisiana, In re Regulations for Competition in the Local Telecommunications Market*, General Order, app. B, sec. 201 (LPSC, rel. Apr. 1, 1997) ("TSPs are permitted to

scope of section 253 as it might apply in such cases.⁶⁸ While the requirements of other states are not before us at this time, we would expect to apply a similar analysis to other state statutes. Thus, we encourage these and any other states, as well as their respective regulatory agencies, to review any similar statutes and regulations, and to repeal or otherwise nullify any that in their judgement violate section 253 as applied by this Commission.

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the Petition for Preemption and Declaratory Ruling filed by AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. on May 29, 1998, IS GRANTED to the extent discussed herein, and in all other respects IS DENIED.

25. IT IS FURTHER ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the enforcement of Tenn. Stat. Ann. § 65-4-201(d) and the *Denial Order* are preempted.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

provide telecommunications services in all historically designated ILEC services areas . . . with the exception of service areas served by ILECs with 100,000 access lines or less statewide.”); New Mexico, N.M. STAT. ANN. § 63-9A-6 D (1997) (“[A]ny telecommunications company with less than one hundred thousand access lines . . . shall have the exclusive right to provide local exchange service within its certificate service territory”); North Carolina, N.C. GEN. STAT. § 62-110 f(2) (1997) (“[The Commission shall not be authorized to issue a certificate] applicable to franchised areas . . . served by local exchange companies with 200,000 access lines or less”); Utah, UTAH CODE ANN. § 54-8b-2.1(2)(c) (1953) (“An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the Commission to exclude from an application [filed by a competing LEC] any local exchange with fewer than 5,000 access lines”); and Oregon, OR. REV. STAT. § 759.020 (1989), Admin. Rules Chapter 860, Div. 32, 860-32-005(8)(a) (providing for certification of competing LECs if the ILEC “consents or does not protest”).

⁶⁸ Hyperion Petition at 21.